

# 1995 SIEBENTHALER LECTURE

## A JURISPRUDENCE FROM THE PERSPECTIVE OF THE “POLITICAL SUPERIOR”

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I take as my text a passage from John Austin. When Austin delivered his inaugural lectures as the first chairholder of the Professorship of Jurisprudence at the University of London in 1828, he imprinted a conception of law on popular and scholarly thinking that has endured for almost two centuries. Austin defined law as the command of a political superior to a political inferior accompanied by the threat of the imposition of a sanction—an “evil”—for deviation from the command.

Of the laws or rules set by men to men, some are established by *political* superiors, sovereign and subject: by persons exercising supreme and subordinate *government*, in independent nations, or independent political societies. The aggregate of the rules thus established . . . is the appropriate matter of jurisprudence, general or particular. To the aggregate of the rules thus established . . . the term *law*, as used simply and strictly, is exclusively applied.<sup>2</sup>

In framing his definition and, in particular, in breaking with Bentham’s broader and more pragmatic notion of sanctions, Austin was probably concerned with certain larger social issues. His followers were not. They gravitated toward the second half of this relational definition and assumed that the proper, indeed only jurisprudential focus was the perspective of the political inferior, the subordinate, the receiver of the command. The perspective of those at the upper end of Austin’s diad, the political superior, was ignored or excluded from the definition of law. That perspective became “political,” a term which supposedly removed the operations associated with it from the legal process and, hence, from legal inquiry.

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2. JOHN AUSTIN, THE PROVINCE OF JURISPRUDENCE DETERMINED 2 (Legal Classics 1994).

The perspective of the low man on the totem pole has become the major focus for Anglo-American legal study and conceptualization. Law, in this conception, is a body of rules, the particularized expressions of the command of the legal superior. While the person issuing the command is certainly making a choice in identifying and selecting a particular practicable option, the content of that choice, the command, is beyond the appraisal of the subordinate who receives it. From the perspective of the political inferior, law does not allow for choice; it is merely the result of the commands of the political superior, a body of rules to which the inferior is subordinated. The function of the subordinate is to comply personally or, where appropriate, to implement the command. The function of jurisprudence is to instruct on when and how to comply.

Austin's formula is frequently referred to as "the command theory" of law, but it is actually the "commanded's theory of law" or the "subordinate's theory of law." That perspective has determined what the "important" jurisprudential problems are. Subordinates, who expect to be the target of evils for deviations from commands of superiors, know that they had better get the command right. Hence this perspective is almost obsessively concerned with how one identifies law or, in a phrase recurring in international legal inquiry, what comprise the "sources" of law and, when they are inconsistent or contradictory, which of them is to receive priority. Terms like "obliged" and "obligation" are, even now, endlessly analyzed and detailed syntaxes of obedience are developed. Because political superiors do not always make themselves clear, their subordinates develop elaborate hermeneutic and interpretive codes to ensure that the person receiving the command does exactly what the political superior—omnipotent in everything but clarity of expression—wanted. Because the commands of the political superior sometimes run athwart personal or sub-group moral codes, detailed and often anguished justifications for contingencies of non-compliance—"civil disobedience"—must be generated.<sup>3</sup>

This jurisprudence is not descriptive of how people actually perform legal roles or how they actually comply. If that were the case, the commanded's theory of law would be an even more complicated enterprise, for self-defined political inferiors engage in a great deal of choice in the course of compliance. Rather, the commanded's jurisprudence is prescriptive or "censorial," examining how the political inferior *should*

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3. *Id.* at 169-72. For discussion, see W. Michael Reisman, *The Tormented Conscience: Applying and Appraising Unauthorized Coercion*, 32 EMORY L.J. 499 (1983).

act. This observation is not a criticism. Jurisprudence is not sociology; it is prescriptive or deontological. Its major contribution is to explicate how legal tasks *should* be performed. And, to be sure, how one should obey is sometimes a relevant and, for that reason alone, a jurisprudentially worthy question.

Legal theories that take account of the inherent indeterminacy of language or, as Hohfeld demonstrated,<sup>4</sup> the multiple meanings hidden in apparently univocal statutory formulations, generate angry and passionate responses from those who adopt the commanded theory of law. For the political inferior, such theories that, as it were, take this legal system off the gold standard, are worse than nihilistic. They kill the prince, the boss, the king—indeed God (a quintessential political superior in Austin's conception).<sup>5</sup> They appear to threaten not only the integrity of the legal and political system, but even the fabric of the individual personality. Of course, even the applier committed to the "commanded theory of law" must often make social choices, i.e., choices with policy impacts on many others, because of the linguistic indeterminacy of much communication and the potential for multiple meanings of commands. But the power of the "commanded theory of law" is such that many appliers making these choices still hold themselves out as political inferiors and pretend (and may even persuade themselves) that they are not making choices. They are simply divining the will of the superior and obeying.

Austin used the term "political inferior" in an entirely designative and even honorable fashion. This term is not pejorative nor should the importance of the lower half of Austin's diad be minimized. All of us must learn, among the repertory of roles we are assigned in life, when and how properly to play the part of the political inferior. Learning when and how to obey is indispensable to the operation of any organization. Indeed, an organization, whether military or civilian, cannot exist if some actors do not learn and perform the role of the subordinate.

However, the person who, as part of his or her professional function, is knowingly and legitimately making social choices, and not the person who is or believes that he or she should only be faithfully implementing them, needs a theory of law for the self-conscious political superior. A jurisprudence for the political superior identifies the intellectual tasks and necessary legal and moral conceptions of this perspective. Its focus is not rational choice as such, but the *jurisprudence* of rational choice. That is

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4. WESLEY N. HOHFELD, *FUNDAMENTAL LEGAL CONCEPTIONS* (1923).

5. See AUSTIN, *supra* note 2, at 1-2.

not an oxymoron. Choice need not be an inherently unbridled or arbitrary exercise of discretion or capriciousness nor is it inherently illegal, a-legal or super-legal. But choice that is practiced covertly and publicly denied is more likely to be some or all of the above. Choice is itself part of the legal process and can be subject to authoritative policies.

Paradoxically, the need for a jurisprudence from the perspective of the political superior is particularly acute in democratic political systems. Authoritarian systems, whatever their myth, enable the elite to do what it deems best for itself and to lie about it, if convenient. Socrates extolled the "noble lie" as an indispensable elite technique in his imagined Republic. Pharaonic systems were believed to have exalted the capriciousness of the monarch as a way of distinguishing the god-king from all other mortals. The Caesarist system said "quod voluit Caesar habet vigorem legis." In such systems, a theory of rational choice might have been useful. A *jurisprudence* of choice would have been irrelevant. But democratic systems, in contrast, derive political authority from the consent of the governed and expect authorized power to be used in ways that contribute to the common good. One of the functions of jurisprudence, properly determined, in a democratic political system, is to identify the points of choice in the legal process—the inescapable roles of political superior—and to clarify the policies that should govern its execution and appraisal.

This proposal is a prerequisite of rational and responsible elite behavior. Yet it is not an exclusively "elitist" approach, as that term is popularly used. Nor is it inherently undemocratic or anti-democratic. The opportunity and inescapable burden of choice-making is, in fact, rather widely dispersed in the lives of people in modern industrial social systems, in politics and in the performance of legal roles everywhere. While many of us often find ourselves in the position of the "political inferior," we also find ourselves, more and more frequently, in a position to make social choices. Like Moliere's M. Jourdain, who discovers that through all these years, and without realizing it, he has been speaking prose, we have all functioned at different times as political superiors.

The relatively wide distribution of the opportunities and competence to make choices is a rather recent feature in the history of our species. It is an inherent part of what we call the modern world or period. For most of the history of our species, choice was the prerogative of a small group of people, some of whom made choices regularly for themselves and others, some of whom made choices, if at all, only a few times in their lives. The rest rarely made choices for themselves or by themselves. Choices were made by parents, village elders, priests and shamans. Mates were

often selected by others, ethical choices, if the opportunity for making them even arose, were made by others, decisions about crops, planting and harvesting were dictated by transmitted cultural forces or by certain leaders, and so on. Even those who were making choices usually described and may have considered their operations as interpretation of and compliance with superior orders.

Outside of nascent cities, people were largely self-sufficient. The market was primitive and generally not based on cash exchange, so the role of "consumer" making all sorts of choices (purchases) from options of varying ranges, simply did not exist. Even where some ambit of choice was allowed, the parameters were tightly drawn due to primitive technologies of transportation and communication.

The modern, in contrast, is constantly making choices: in politics, from the local to the national level; in the market-place; in learning processes; in matters of personal health; in matters of friendship and sexual expression; in matters of religious affiliation; if not, indeed, in every sector of life.

The possibilities and ambit of these personal choices shape and are shaped by the community processes within which they take place. The community, whether by collective or by imposed decision and whether by intention or inadvertence, has made and sustained certain critical choices about the range and distribution of individual choice. There are, thus, always correlations between larger social arrangements and the distribution and ambit of personal choice. Consider a few examples:

In *political* terms, one may correlate choice opportunities, in the aggregate, with the degree of democratic power-sharing, whether in the polis, work place, the school, the family, or any other setting in which the way that people influence each other affects the distribution of the things produced there. The prerequisite for the distribution of choice in this sphere is collective maintenance of minimum order. Assuming that minimum order is assured, the increasing complexity of economic life and the interdependence of all actors in the market is a factor inducing further power sharing. Any situation in which people must take account of what others do and think accords those others a degree of influence they would otherwise not have.

In *economic* terms, choice presupposes a productive market with a wide variety of consumables. Where the market operates, choice opportunities are found at the intersection of (i) discretionary income left after survival needs are satisfied and (ii) the diversity and abundance of goods and services produced in the accessible market. The more discretionary income a person has, the more opportunities for choice he or she has:

whether to conserve or spend and, if the latter, how to spend. The more diverse and abundant the products of the market, the more opportunities the consumer has to exercise choice. Discretionary income without diversity and abundance of goods and services, like diversity and abundance of goods and services without discretionary income, means no choice.

In terms of the cultivation of *enlightenment and skill*, choice opportunities correlate with a political system that maintains minimum order and a market that has produced an abundance sufficient to satisfy survival. Such a situation allows a diversion of some of the surplus to inquiry that is not necessarily concerned with the enhancement of survival and material production and that has continued this practice long enough to permit the intergenerational transmission and hence accumulation of knowledge. In terms of personal opportunities, the ability to cultivate enlightenment and skill correlates with the extent to which whatever class, caste, racial, religious, and gender boundaries obtain are permeable to individual ability or energy and the extent to which time and energy may be diverted by the individual from the basic struggle for survival.

In *personal* matters, opportunities for choice depend upon legal and ethical systems that tolerate or encourage the exploration and cultivation of agapic and erotic affection, and technologies, such as prophylaxis and abortion, that permit participants to concentrate on the cultivation of affection by postponing or evading the biological or epidemiological consequences of the activity.

Implicit in these examples is a contextual dimension to choice opportunities. The opportunities for making political choices depend, for all but absolute rulers, on a degree of effective and stable democracy. The opportunity for making economic choices depends upon a vigorous market. The opportunity for choices with regard to the cultivation of enlightenment depends upon cultural toleration and institutional arrangements. Obviously many of these environmental factors are themselves the results of collective social choices. Democratic politics itself is an institutionalized process of making choices.

It is also clear that because the ambit of choice available to individuals is determined by the system in which they find themselves, the distribution of choice options, at any moment, will vary from country to country, from class to class, from gender to gender, and so on. At this moment, a young American will have more choice options than, let us say, a young Chinese, and an Iranian man will have more choice options than an Iranian woman. There is nothing new about this unequal distribution of life opportunities. What is new is that people the world over have come increasingly to share a common set of expectations about which

issues constitute "problems" requiring resolution and that the task of selecting the means of resolution should be within the province of individual choice. The opportunity to make such choices is also widely demanded and the comparative deprivation of these opportunities is increasingly viewed as intolerable.

Lurking behind modern social structures, which create opportunities for making choices, are fundamental assumptions that run deep in our civilization and distinguish it from others. Whatever the congruence of perception and reality, any discussion of choice presupposes most fundamentally a common assumption of the efficacy of human agency, that what humans do precipitates consequences, whether on the self, on others, on the environment, or on all of them. The conception of the efficacy of human agency also has a larger social vector in our civilization. Our civilization is premised on a notion of progress, a constant accumulation and intergenerational transmission of improvements in the self and the environment. Our conception of time is linear. There is a future; it will be different because of things we do, and it may be better. We should be able to look toward it with confidence. Within this framework of assumptions, human beings can be efficacious, for the potential effectiveness of human agency is beyond doubt. In other civilizations, in which these assumptions do not obtain, the character and even veneration of choice is substantially different. In civilizations in which conceptions of time are circular rather than linear, in which material achievements are viewed as *maya*, and in which the self and the efficacy of human agency may be believed to be pathetic illusions, our notions of and concern with choice are viewed as part of an exotic cult of collective self-delusion. Nevertheless, the emergence of a homogenized global civilization of science and technology appears inexorably, like it or not, to be moving all of us toward more rather than less choice.

#### CHOICE-POINTS IN CONTEMPORARY LEGAL SYSTEMS

Lawyers and legal scholars in our civilization tend to view judicial application as the paramount function in law. Judges' roles are certainly important but, as an empirical matter, there are many other critical functions in legal decision. The specification of existing norms to a particular dispute, whether by courts, arbitrators, administrators, military officers, or whoever, and the resolution of the dispute, perhaps by fashioning some remedy, presuppose the prior authoritative establishment of norms. That function may be best called "prescription," because the term is broader than the word "legislation." "Legislation" evokes a legislature, but so much of the corpus of critical norms in any social arrangement is

created in private sectors and through so-called customary processes<sup>6</sup> that use of the word "legislation" would narrow the aperture of observation and miss a good deal of choice activity that is important in law. Prescription, for its part, is anticipated and followed by other functions that are part of decision. In all, my colleagues and I have found it useful to identify seven functions of decision.<sup>7</sup> They are:

- (1) *intelligence*, or the gathering, processing, and dissemination of information relevant to making social choices;
- (2) *promotion*, or the processes by which individual or collective awareness of a discrepancy between a desirable state and one that is or is about to take place gradually leads to a demand for some type of community intervention and regulation;
- (3) *prescription*, or law-making, which occurs when actors, with varying degrees of authority, select and install certain preferences about policy as community law. This may be accomplished by a legislature or some other organized law-maker; but it is usually, and, especially in international law, largely accomplished in informal and sometimes even chaotic processes whose outcomes are generally referred to as "custom.";
- (4) *invocation*, or the provisional characterization of a certain action as inconsistent with a prescription or law that has been established. Invocation is often accompanied by the demand that an appropriate community institution act;
- (5) *application*, which involves the organization of the facts of a particular dispute, the specification of a norm or norms that apply, and the fashioning of a mandatory formulation. When this takes place in a court, it is called a judgment, but it also occurs in informal, unorganized situations;
- (6) *termination*, or the abrogation of existing norms and the social arrangements based upon them, the development of transitional regimes and, where appropriate or necessary, the design of compensation programs for those who have made good-faith value investments on the expectation that the old regime would continue; and
- (7) *appraisal*, which is concerned with evaluating the aggregate performance of all decision functions in terms of community requirements.

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6. Indeed, even at the micro-legal level: see, in this regard, W. Michael Reisman, *Lining Up: The Microlegal System of Queues*, 54 U. CIN. L. REV. 417 (1985); *Rapping and Talking to the Boss: The Microlegal System of Two People Talking*, CONFLICT AND INTEGRATION: COMPARATIVE LAW IN THE WORLD TODAY (Chuo University, 1988); *Looking, Staring and Glaring: Microlegal Systems and World Public Order* (The McDougal Lecture) 12 DENV. J. INT'L L. & POL'Y 165 (1983).

7. See Myres S. McDougal et al. *The World Constitutive Process of Authoritative Decision*, in INTERNATIONAL LAW ESSAYS: A SUPPLEMENT TO INTERNATIONAL LAW IN CONTEMPORARY PERSPECTIVE 191, 267-86 (1981).



Each of these functions of decision presents distinctive opportunities for making choices and poses special jurisprudential questions about how those choices should be made. Thus, persons engaged in gathering information for decision must decide what items are important or are "problems." Persons engaged in promotion have a relatively wide discretion to select the programs for which they will agitate.

A jurisprudence that directs itself to the first half of Austin's diad must be concerned with the efficiency with which each of these decision functions is performed but, equally, with the normative or prescriptive dimensions that should guide each function's performance. In much the same way that the jurisprudence of the political inferior is largely concerned with exploring how to obey, the jurisprudence of the political superior must be concerned with how to choose.

There are four intellectual tasks whose performance is pertinent to all seven of the functions.

#### FIRST INTELLECTUAL TASK: CERTIFICATION OF STANDPOINT

We may use tools to increase the accuracy and efficiency of some of our intellectual operations, but in all such activities the individual self-system is the ultimate instrument of perception, appraisal and, in particular, choice. We take it for granted that it is necessary, from time to time, to calibrate all the instruments we use, but we do not insist on a corresponding self-calibration. A jurisprudence of social choice insists on the development of a praxis of self-calibration through various techniques of self-scrutiny. The person performing a decision function is urged to examine the self for latent emotional problems or neurotic tendencies, for subgroup parochialisms, and for the distortions that may arise from professional conditioning or what the French call *déformation occupationnelle*. Self-scrutiny is not a single act. It is not accomplished once and for all but should be a continuing process of searching inquiry into the dynamics of one's self. Each contemporary experience is, in part, a stimulus for self-examination in what will hopefully result in a cumulatively better understanding of the self.

Certain psychological and possibly psycho-biological features of choice must be understood. An element in all choice is the psycho-biological impulse to end the tension and dysphoria created by the need for choice by resolving an uncertainty by doing *something* that will hopefully relieve the tension. People making choices should be aware of the role that tension and dysphoria play in pressing one to decision and should not yield to them automatically; in many circumstances, it may be better to resist

and to do nothing, as a matter of choice. Or, to invert the common-place, as Lewis Carroll put it, "Don't just do something. Sit there!"<sup>8</sup>

The choice-maker should also be aware of certain cultural fantasies that are nourished by some epistemological dynamics within our civilization. One of the reasons why we are not always realistic in our targets for choice or in our time tables for achievement may be due to the mass visual reinforcement, on a daily basis, of a truncated and simplified image of cause and effect through space and time. Viewers of the mass media in advanced industrial systems perceive selected events presented as "cause" and selected events presented as their "effect" as a relatively straight-forward and unnuanced sequence and in an unusual, if not wholly unreal, physical and temporal proximity. This technique has been called the "cinematographic effect."<sup>9</sup> The cinematographic technique has become a fundamental part of the epistemology and "reality" of the modern human being. We are able to operate in an extraordinarily complex world by having a simplified artifact of reality in which cinematographication cuts even further through complexity to establish an order of cause and effect. Its virtual simultaneity gives viewers who are force-fed on it an illusion—designed to have high verisimilitude and, ultimately coming, for the viewers, to be reality itself—of accelerated and generally successful wish fulfillment or goal realization.

Cinematographication, as currently used, also exaggerates the contribution of individual acts to collective efforts and to their consequences. In the industrial democracy characterized by a widely shared sense of the appropriateness of personal choice, by a belief in the popular capacity to make informed judgments, and by the enlargement of the civic conscience, the cinematographic effect reinforces a belief in the effectiveness of individual action and the sense of responsibility for it. All of this reinforces the perception of the actuality of accelerated change in this century and contributes to inflated expectations about social and geographical mobility, the extravagant sense of possibility in several significant social strata, and the unwillingness to wait or defer gratification. Clarification of standpoint must address these biological and cultural factors that play upon choice-making.

There is another dimension to this first intellectual task concerning certification of standpoint. Modern science has been acutely conscious of

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8. LEWIS CARROLL, *ALICE'S ADVENTURES IN WONDERLAND* (MacMillan & Co. of London ed., 1866).

9. RUDOLF ARNHEIM, *FILM AS ART* 20-29 (1957); *see also* Reisman, *supra* note 3, at 504-05 (discussing cinematographic effect).

the need for sensitivity and clarity about the perspective from which phenomena are viewed. For any phenomenon, there are many possible standpoints, each of which affects and shapes what is viewed and how it is viewed. An indispensable intellectual tool concerns clarity with regard to what contemporary philosophy of science refers to as "observational standpoint." Both the reference and content of the term "law" or "choice" will vary depending on whether the standpoint is that of a member of the elite or the rank-and-file, whether the observer is a member of the system observed and has internalized its folklore, myth and miranda, or is an outsider. Perception of the same phenomenon may vary depending on the culture, class, gender, age, or crisis-experience of the observer. Even within the legal establishment, reference and content will vary depending on whether the observer is a legislator, a judge, a prosecutor, a jurymen, a defense attorney, an accused, or a victim.

No particular standpoint in this jurisprudence is more authentic than another, but both scholar and choice-maker must be sensitive to the variations in perception which attend each perspective, try to disengage himself or herself, select one that is appropriate to the task, and then carefully certify and consistently maintain it.

#### SECOND INTELLECTUAL TASK: CAREFUL SELECTION OF FOCAL LENSES

The political inferior is concerned with following a rule. The political superior is concerned with changing or stabilizing some part of the social process. A jurisprudence for this latter perspective must develop techniques for focussing upon those aspects of the social process that impinge upon choice-making and are targets of choice, whether for stabilization or change. The "techniques" are conceptual categories. We look at our environment and specific issues within it "through" a variety of conceptual categories. It may be useful to think of them as lenses. In the physical sciences, different lenses and dyes permit the observer to bring different features or properties of the same viewed object into sharper focus or greater prominence. A comparable function may be performed in the social sciences by carefully crafted conceptual categories which serve as "focal lenses."

##### *a. Comprehensiveness and Contextuality*

The political superior must avoid the temptation, so common in conventional legal method, to drastically reduce the universe of variables to be considered to either a text or a few purportedly *key* social factors. This reduction is an understandable inclination on the part of the political

inferior. In the search for the command, it is useful and sometimes politically safer to narrow the focus to a single authoritative source. Personal responsibility is greatly minimized if one is not obliged to scan a wide range of variables and make independent judgments, on the basis of all of them, as to what the appropriate response is. From the perspective of a political superior consciously making choices, however, this limitation would be self-defeating. Whitehead's conception of "reality" as a manifold is the appropriate starting point. This approach requires the choice-maker to use the popular technique of "modeling" with great caution, for every model is built on the assumption that one or a few key variables may be relied upon, to the exclusion of all others, for explanatory and predictive purposes.

A person making choices, especially those on behalf of large aggregates of people, must operate initially with a focal lens that permits the scanning of the widest range of factors within the broadest context imaginable. This means dealing with a lot of information. It does not mean that the task is unmanageable. In advanced, industrial, and science-based civilizations, some major decisions are ongoing and incorporate-in collecting relevant information, exploring alternative possible arrangements, and implementing choices—the efforts of many people, sometimes totaling many thousands of hours, extending over long periods.

#### *b. Selectivity*

Yet one cannot study everything, especially for decisions that must be made quickly or decisions whose aggregate social value could be less than the costs of processing vast amounts of information. Hence the need to acknowledge the demands of economy and to develop various selective techniques, especially when decision-making must be rapid. But selectivity must not be carried to the point of frustrating the need for comprehensiveness and contextuality.

#### *c. Law as Authoritative and Controlling Decision*

The notion of law as a body of rules, existing independently of decision-makers and unchanged by their actions, is a congenital part of the intellectual and ideological equipment of the political inferior operating in complex organizations. It makes no sense in the jurisprudence of the political superior. The political superior necessarily conceives of law as a process that is generated by human beings, in which some, playing the role of political superior, try to influence the way social choices are

continuously made about the production and distribution of resources, including considerations about the ways that decisions should be made about those things.

Hence the informed political superior will find it most useful to conceive of law, not as rules, but as the ongoing process, of which rules are a part, through which human beings make authoritative decisions. A distinction can be drawn between decisions which are taken entirely on the basis of naked power without regard to the expectations of rightness of the people influenced by them and decisions which conform to those expectations, but lack all effectiveness. From the perspective of a jurisprudence of social choice, the word "law" is reserved for those processes of decision which are both consistent with the expectations of rightness held by members of a community (authoritative decisions) and which are effective (controlling decisions). These are, one might add, likely to be the most efficient decisions, for they draw, for their support, both on effective power and on the expectations of authority of those to whom they are directed. While the particular mix of authority and control may vary widely, a conception of law as authoritative and controlling decision protects the person making choices from exercises in irrelevance, whether because of absence of authority or absence of control.<sup>10</sup>

#### *d. Constitutive Process*

In any group process, some decisions will be concerned with the way decisions henceforth will be taken in that setting. Surely the political superior will be concerned about choices that not only deal with a particular issue, whose importance may loom large for the parties concerned but not necessarily for the community and its destiny, but with choices that fundamentally restructure the way community decision-making will be taken in the future. The term "constitutive process" refers to that portion of a group's activity concerned with establishing, maintaining, or changing the fundamental institutions and procedures of decision-making. From the perspective of a jurisprudence for those making choices, a focal lens which clearly identifies when constitutive decisions are being taken and how they are likely to impact on and shape the constitutive process in the future is important.

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10. W. Michael Reisman, *International Lawmaking: A Process of Communication*, (The Harold D. Lasswell Memorial Lecture), Proceedings of the Am. Soc. of Int'l L., April 23-25, 1981 at 101.

## THIRD INTELLECTUAL TASK: A MAP OF COMMUNITY PROCESSES

Focal lenses address the question of *how* scientific observers and persons charged with making choices for the community look at pertinent data. We have yet to consider *what* these observers look at. Beginning law students painfully learn that conventional legal analysis and theories that take the perspective of the political inferior and that conceive of law as a body of rules, look only at a limited number of texts, characterized as "legal," and at those artifacts of social events, "facts," to which the rules direct attention. But political superiors are concerned with understanding and influencing decision in ways that will enhance their ability to precipitate desired social outcomes. Hence the *what* of inquiry in the jurisprudence of the political superior must be broader than the political inferior's *what*.

The New Haven School of Jurisprudence has adapted, with a number of adjustments, a scheme of cultural anthropology, in which any social process is described systematically in terms of those who engage in it (the participants), the subjective dimensions that animate them (their perspectives), the situations in which they interact, the resources, upon which they draw, the ways they manipulate those resources and the aggregate outcomes of the process of interaction, which are conceived in terms of a comprehensive set of values.

The participants in any decision process include those formally endowed with decision competence, such as judges, and all those other actors who, though not endowed with formal competence, may nonetheless play important roles in influencing decision outcomes. In international decision, the observer must examine, in addition to formal international organizations, state officials, non-governmental organizations, pressure groups, interest groups, gangs, and individuals, who act on behalf of other participants and on their own.

By the same token, the inventory will not be of much use if it does not take account of the perspectives of these actors. These perspectives include their specific patterns of identification and disidentification, their matter-of-fact expectations of past and future and the value demands they project. It is clear that in a complex arena, such as international politics, the perspectives of the various participants actually playing a role in decision often diverge greatly in critical ways.

Situations, as the New Haven School uses the term, refers generally to where decisions are made and the distinctive properties of that "where." Conventional legal analysis generally looks to courts, secondarily examining the work of executive branches and legislatures. The New Haven School adopts a more functional approach in which it tries to focus on the

range of centralized and decentralized settings in which decisions are actually taken, their varying degree of organization and formality, the extent to which they are specialized or not specialized, and the extent to which they are continuous or episodic. We also consider it important to examine the extent to which participants in a particular situation perceive themselves to be in a state of crisis in which critical values are deemed to be at stake.

The resources on which participants draw—their “bases of power”—incorporate both effective power and symbols of authority. The New Haven School considers it appropriate for the jurist to correlate the extent to which control of power is available to support particular formulations that are presented as law. The ways in which resources are manipulated, or the strategies used by different participants, involve the management of resources aimed at optimizing preferred outcomes. Strategic modes include military, economic, propagandistic, and diplomatic techniques in varying ensembles.

Conventional legal analyses that take the perspective of the political inferior usually characterize the outcome of a legal decision as a more specific statement of a rule. The political superior making a choice conceives of outcomes in terms of the confirmation or redistribution of the values at stake: of power, wealth, enlightenment, skill, well-being, affection, respect, and rectitude.

#### FOURTH INTELLECTUAL TASK: A PRAXIS OF CHOICE-MAKING

The political inferior complies with a command. Hence the methodology developed by jurisprudence that takes the perspective of the political inferior is primarily concerned with identifying and interpreting that command. From the perspective of the political superior, however, making choices requires a different methodology. It consists of five steps.

##### *a. Goal Clarification*

A conception of purposive behavior requires an idea of what end that behavior seeks to secure. A person engaged in performing any decision function that involves choosing should examine the demands of particular actors in terms of their congruence with the common interest, expressed as preferred patterns of production and distribution of every value within a system of stable minimum order. This is not a derivation from some higher authority, but an act of willing a goal oneself.

*b. Trend Analysis*

Once a goal has been specified, it is necessary to examine the degree to which it has been achieved in past decisions. This essentially historical task requires the identification and organization of trends in pertinent past decision in terms of the goal expressed.

*c. Factor Analysis*

In making policy choices, it is important to correlate identified trends in past decisions with the conditions that influenced them and to note whether that context of conditions has changed in material and pertinent ways.

*d. Predictions*

What will be is a function of what actors elect to do now. Projecting different decision options and then examining the prospective aggregate value consequences of each in terms of the goals that have been clarified permits the jurist to select and, through time, to adjust particular recommendations so that they increase the probability of the eventuation of a preferred future while minimizing the eventuation of dystopic ones.

*e. Invention of Alternatives*

Making a choice involves, by its nature, much more than canvassing and selecting from the rules of the past. When, as is often the case, predictions suggest a likely discrepancy between a goal preference and a probable future, the jurist with responsibility for making a choice should explicitly explore possible new arrangements to increase the probability of the occurrence of a desired future. This intellectual task is active and inventive and, moreover, is potentially interventionist. It engages the fundamental responsibility of the jurist and the citizen.

## JURISPRUDENTIAL POLICIES

The critical contribution of most contemporary jurisprudence is the clarification of policies that can guide the performance of the legal functions that the particular school or frame of jurisprudence is addressing. Jurisprudential theories that explicitly or implicitly take the perspective of the political inferior are primarily concerned with developing policies for the efficient identification of the command, the determination of its significance in the new context, and its efficient implementation. A jurispru-



dential theory which takes the perspective of the political superior and is concerned with providing normative guidance for choice must approach the matter differently. Let us look briefly, then, at policies for each decision function that are appropriate for this perspective

*a. Policies for Intelligence*

Intelligence comprises the gathering, evaluation, and dissemination of information relevant to decision-making; prediction based on the intelligence derived; and the planning for future contingencies. The sequential phases of intelligence are gathering, processing, and dissemination. The processing phase itself may be subdivided into sequences such as storage, retrieval, and utilization.

Many individuals performing manifest legal functions are engaged in intelligence. Judges and their assistants, in assembling facts and assessing the aggregate consequences of alternative decisions, depend upon intelligence that they either gather themselves or receive. Legislators, whose role requires them to seek to devise instruments and programs to determine, first, what are desired social effects and, second, how to achieve them, also depend on intelligence. Many modern legislatures develop their own intelligence gathering entities, though in modern complex societies, politically relevant intelligence is also gathered and processed in media, industry, universities, and "think tanks."

In order for the intelligence function optimally to serve a decision process, it must be dependable, comprehensive, readily available and economic in the consumption of resources in producing of intelligence.

The individual who engages in intelligence has considerable freedom of choice in determining what he or she wishes to investigate. This choice should not be made capriciously or on the basis of unexamined likes or dislikes, but on the basis of a systematic intellectual effort to determine which matters of concern to the common interest require additional study and recommendations. Once having settled upon a subject, responsibility requires the exercise of independence and integrity and a degree of self-awareness sufficient to enable the investigator to distinguish the rigorous interpretation and assessment of the trend material that is being assembled from the individual preferences of the person performing the intelligence function. This is not a particularly novel notion. Most scientific disciplines have explicit or implicit professional codes or codes of ethics that are relevant to the proper performance of the intelligence function.

*b. Policies for Promotion*

The function of promotion involves active advocacy to the community of policy alternatives. Promotion is ubiquitous. We promote policy alternatives on committees, in faculties, in government departments when we espouse a particular viewpoint, before parliaments, through the media when we speak as commentators, or through violent street confrontations and other forms of intense and coercive agitation.

Promotion is a high choice function. In contrast to intelligence, which requires the suspension of the operation of personal preference for disengaged observation and reporting, promotion invites the self to select arrangements that it believes are conducive to its own and others' interests and to press, with increasing degrees of intensity and clarity, for acceptance of that formulation as community policy. In the United States, much promotion is conducted by lobbyists in capitals at the state and federal level. For a fee, lobbyists undertake to persuade law-makers to accept one version of the common interest and to assist them in establishing legislative programs that will secure and protect it. "Lobbying" has earned a dubious name because it is associated with the act of promoting special interests, rather than those that sound in the commonweal. Not all promotion, however, is lobbying.

Plainly, the exercise of choice in promotion should be animated by a concern to find a policy or legislative instrument that expresses the common interest of the entire community rather than the special interest of a particular actor.

*c. Policies for Prescription*

The function of prescription or law-making involves the selection of a particular policy and the design of a program for its implementation. The sequences of this function are initiation, exploration of potentially relevant facts and policies, formulation or characterization of the facts and policies as relevant, and promulgation of the prescriptive outcome to a target audience.

In purely organizational terms, prescription seeks efficiency, clarity in communication to the designated audience and a credibility of commitment to make the prescription effective. Clarity of communication and credibility are prerequisites to securing compliance. A community may elect not to prescribe for many sectors of community life, but the law-making function is a requirement of any community. As a structural matter, prescription should operate promptly and should be comprehensive in its scope such that it addresses all the prescriptive needs of the

community. In its procedures, it should be contextual in exploring the range of facts and policies relevant for its conclusions and should ensure that its content is consistent with the common interest of the community. It should be effective in promulgating its content to the target audience.

In democratic systems, two critical policies act to limit the range of prescription. The first is respect for a private sphere, which restrains the putative law-maker from making more law than is minimally necessary for the common interest of the community. Respect for a private sphere maintains a broad and vigorous "civic order" which is characterized by minimum community intervention. A second and even more profound restraint arises from the fundamental respect that a democratic system has for the unique individuality of each of its members. Democracy is more than majority decision; the majority, by itself, can constitute a tyranny. Majority decision is simply one of a repertory of techniques of democracy, which is preferred because of an underlying acceptance of and respect for the individuality and unique worldview of each person. But this postulate of democracy acts as an inherent limit on what a majority, its numbers notwithstanding, can do and forces the cultivation of a continuing respect for the interests of minorities, which must be reflected in the ongoing refashioning of the common interest. Thus, the majority and its spokesmen must refrain from characterizing a minority's demands as "obstructive" and must be willing to defer some of its own preferences until a broad consensus emerges.

#### *d. Policies for Invocation*

Invocation refers to the provisional characterization of facts as deviating from prescribed policy and the provisional assertion of control to prevent or abate the deviation or to secure control of individuals or values necessary for subsequent application. The word "provisional" is critical in this function, for enormous value deprivations may flow from hasty and irresponsible characterizations of delinquency or defection from community norms.

The phases of invocation include initiation, exploration of facts and policies, provisional characterization and, critically, the initiation of applicative arenas in circumstances in which provisional characterizations indicate a violation of community prescriptions.

In modern complex societies in which communication networks are widespread, many individuals without official sanction may play roles in invocation. Precisely because invocation can be so destructive, it may be very tempting to individuals who are frustrated or who seek outlets for

violence to exploit invocative opportunities for their own ends. Hence the jurisprudential policies for invocation should seek a balance between promptness and efficiency, on the one hand, and adequate safeguards against irremediable value deprivations on the other. Those who would invoke must understand themselves and the factors that motivate them. When those factors go beyond or conceal themselves behind indignation at the apparent violation of law, the responsible choice is not to invoke.

*e. Policies for Application*

Application represents the transformation of authoritatively prescribed policy into controlling event. Its components are initiation, exploration of potential facts and policies, characterization of facts and policies, enforcement, and review. The policies of application are concerned, first, with the reinforcement of expectations of effectiveness about the decision process as a whole and, secondly, with a provision of a remedy for a particular case. The rights of individuals in application are critical.

From the perspective of a jurisprudence of the political inferior, application may involve little more than the identification of a rule and its specification to a particular case, without regard to the aggregate consequences that result. The guiding maxim might well be taken from Joshua: "[d]o all that is written in the book of the law . . . turning aside from it neither to the right hand nor the left."<sup>11</sup> From the perspective of a jurisprudence of the political superior, however, aggregate consequences are the very purpose of the law and the responsibility of those making choices. That requires the applier to be highly contextual, capable of relating alternative possible decisions to the most inclusive community policies, conscious of the need for effectiveness of decision, and cost-conscious about enforcement.

Rules play a special role in application. From the perspective of the political inferior, rules are, of course, commands, to be interpreted and strictly applied. From the perspective of the political superior, who is making choices, however, rules are not meaningless nor, as some Critical Legal Studies scholars suggest, are they to be simply ignored. But they are necessarily viewed differently than they are from the perspective of the political inferior. Rules are a species of communication that conveys information. In the legal context, rules express community policies. The function of responsible appliers, who are cognizant of the restraints that their role imposes as well as of the mandate to make the choices that it

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11. *Joshua* 23:6.

requires, is to relate the authoritative information in the rule to its context and to the most inclusive community policies, and then to design a decision that best approximates the aggregate of community policies that are engaged, within the limits that the political situation sets. The responsible applier must be careful to avoid the nihilism of deconstructive theories, the irresponsibility of theories that purport to liberate appliers from all social controls, and the sterility (from this perspective) of a jurisprudence of strict obedience. Metaphors such as Dworkin's "chain novel"<sup>12</sup> may express the spirit of the activity, but do not supply policy guidelines for its execution.

*f. Policies for Termination*

Termination deals with the abrogation of extant prescriptions and the design of arrangements that minimize the disruption of an expected and demanded regime. Termination involves initiation, exploration, cancellation, and amelioration. Maintaining a congruence between our expectations and formally prescribed law is essential to an efficacious process of decision. Terminations are potentially disruptive because, in varying degree, they "expropriate" those who have made good-faith value investments on the supposition (indispensable for public order) that the prescriptions that had been made would continue to be honored and applied. The expropriations may be material, in the sense of loss of property or title, or psychological.

Choice-making in termination operates at many levels of consciousness. Deep antagonisms toward an existing social arrangement or unresolved neurotic memories may lead to great exuberance in termination, a kind of iconoclastic "high." The person engaged in this activity, as in all other decision functions, should self-scrutinize carefully.

The primary policies of termination are the reduction of the cost of social change and the encouragement of change in directions that more closely approximate the common interest of the community. The effectiveness of these policies depends on the cultivation of a climate which is sympathetic to change. But this, in turn, depends upon general expectations that changes when undertaken will minimize the destructive consequences of the abrogation of existing legal regimes.

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12. RONALD DWORKIN, *LAW'S EMPIRE* 228-38 (1986).

*g. Policies for Appraisal*

The political inferior grinds on and on, secure, morally and intellectually, within the universe bounded by the commands of his political superior. Like Henry V's soldiers, he can say, "We know enough if we know we are the king's subjects. If his cause be wrong, our obedience to the king wipes the crime of it out of us." The political superior accepts responsibility and knows that the decision process and the political and social system of which it is a part is an artifact, created by human beings for human beings. As such, it will incorporate and replicate all the limits of their knowledge, experience, and ability. Institutional arrangements for making social choices sometimes seem to acquire a life of their own. As contexts change, they may become less and less synchronized with it.

From the perspective of the political superior, then, it is clear that complex decision processes must provide for an examination of the extent to which their aggregate performance continues to approximate the fundamental goals for which they were established. This is not an easy task. People involved in decision are frequently defensive or narcissistic. Hence the practice of establishing autonomous appraisal agencies, like controllers or inspectors-general is to be applauded. Whatever the structure, effective appraisal requires of those who perform it a cultivation of a capacity for disengagement. It can only proceed if the persons carrying it out operate with integrity, rigor, impartiality, and concern for individual rights.

CONCLUSION

While the jurisprudence of the political superior is easy to caricature as elitist and anti-democratic, the characterization more accurately applies to the jurisprudence of the political inferior, which disempowers those who live under its empire. From the perspective of a jurisprudence of choice, the word "law" is only designative. Unlike other theories of jurisprudence, characterizing a communication as "law" does not necessarily imply approval for its content or, as in commanded theories of jurisprudence, a commitment to obey, to comply, or to implement regardless of how one feels about its content. The jurisprudence of the political superior requires those who apply the law to consider every statement presented as "law" in terms of its policy consequences. Not only is this jurisprudence not incompatible with democracy, the operational reality of democracy dictates it. Accordingly, great responsibility is placed on the individual performing decision roles. But such responsibility is characteristic of every role in democracy. In some respects, an abiding goal in every

democracy is to make everyone a political superior in as many sectors of life as possible.